2005

Douglas L. Stowell, Personal Representative of the Estate of Gary W. Ostler v. Ostler International, Inc., Ostler Property Development, Inc., Dale Ostler, Vyron Ostler : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

DOUGLAS L. STOWELL, PERSONAL REPRESENTATIVE OF THE ESTATE OF GARY W. OSTLER, deceased, Plaintiff and Appellant, vs. OSTLER INTERNATIONAL, INC., a Utah corporation; OSTLER PROPERTY DEVELOPMENT, INC., a Utah corporation; DALE OSTLER and VYRON OSTLER, Defendants and Appellees.	Case No. 20050636-SC

BRIEF OF APPELLEES DALE OSTLER and VYRON OSTLER

On Appeal from Final Judgment of the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable Bruce Lubeck, District Judge

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JURISDICTION

The Utah Supreme Court has appellate jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW and THE STANDARDS OF REVIEW

Issue No. 1: Does the failure of the oral shareholder agreements to comply with the writing and signing requirements of Utah Code Ann. § 16-10a-732 (1992) make them unenforceable?

Issue Preserved for Appeal: On July 5, 2005, Mr. Stowell filed a Notice of Appeal (R327-28), appealing the trial court's Ruling and Order of June 8, 2005 (R. 317-26).

Issue No. 2: Did the oral shareholder agreements expire and become unenforceable due to their failure to comply with the 10-year term requirement of Utah Code Ann. § 16-10a-732(2)(c)?

Issue preserved for Appeal: On July 5, 2005, Mr. Stowell filed a Notice of Appeal (R327-28), appealing the trial court's Ruling and Order of June 8, 2005 (R. 317-26).

Issue No. 3: Do the oral shareholder agreements constitute personal services contracts that expired upon Gary Ostler's death in 2003?

Issue preserved for Appeal: On July 5, 2005, Mr. Stowell filed a Notice of Appeal (R327-28), appealing the trial court's Ruling and Order of June 8, 2005 (R. 317-26).

STANDARD OF REVIEW

"Because the propriety of a 12(b)(6) dismissal is a question of law, [this Court] give[s] the trial court's ruling no deference and review[s] it under a correctness standard." *St. Benedicts Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 196 (Utah 1991). Further, "[w]hen

reviewing a trial court's grant of a rule 12(b)(6) motion to dismiss, '[this Court] accept[s] the factual allegations in the complaint as true and consider[s] them and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff.'" *Alvarez v. Galetka*, 933 P.2d 987, 989 (Utah 1991) (quoting *St. Benedicts Dev. Co.*, 811 P.2d at 196).

DETERMINATIVE STATUTES

Utah Code Ann. § 16-10a-732 (1992) provides:

> (1) **An agreement among the shareholders of a corporation that complies with this section is effective** among the shareholders and the corporation **even though it is inconsistent with one or more other provisions of this chapter in that it:**
>
> (a) eliminates the board of directors or **restricts the discretion or powers of the board of directors**;
>
> (b) **governs the authorization or making of distributions** whether or not in proportion to ownership of shares, subject to the limitations in Section 16- 10a-640;
>
> (c) **establishes who shall be directors or officers of the corporation**, or their terms of office or manner of selection or removal;
>
> . . . .
>
> (e) **establishes the terms and conditions of any agreement for** the transfer or use of property or **the provision of services between the corporation and any shareholder**, director, officer or employee of the corporation or among any of them;
>
> (f) **transfers to one or more shareholders** or other persons **all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation**, including the resolution of any issue about which there exists a deadlock among directors or shareholders; . . . . or
>
> (h) **otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation** or the relationship among the shareholders, the

directors and the corporation, or among any of them, and is not contrary to public policy.

(2) **An agreement authorized by this section *shall* be**:

(a) **set forth**:

(i) in the articles of incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement; or

(ii) **in a written agreement that is signed by all persons who are shareholders at the time of the agreement** and is made known to the corporation;

(b) subject to amendment only by all persons who are shareholders at the time of the amendment, unless the agreement provides otherwise; and

(c) **valid for 10 years, unless the agreement provides otherwise**.

(3) **The existence of an agreement authorized by this section shall be noted conspicuously on the front or back of each certificate for outstanding shares** or on the information statement required by Section 16-10a-626(2). If at the time of the agreement the corporation has shares outstanding represented by certificates, the corporation shall recall the outstanding certificates and issue substitute certificates that comply with this subsection. . . .

. . . .

(5) An agreement authorized by this section that limits the discretion or powers of the board of directors shall relieve the directors of, and impose upon the person or persons in whom the discretion or powers are vested, liability for acts or omissions imposed by laws on directors to the extent that the discretion or powers of the directors are limited by the agreement.

(6) The existence or performance of an agreement authorized by this section may not be a ground for imposing personal liability on any shareholder for the acts or debts of the corporation even if the agreement or its performance treats the corporation as if it were a partnership or results in failure to observe the corporate

> formalities otherwise applicable to the matters governed by the agreement.

(Emphasis added.)

Utah Code Ann. § 16-10a-801 (1992) provides:

> (1) Except as provided in Section 16-10a-732, each corporation must have a board of directors.
>
> (2) **All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors**, subject to any limitation set forth in the articles of incorporation or in an agreement authorized under Section 16-10a-732.

(Emphasis added.)

Utah Code Ann. § 16-10a-1701 (1992) provides:

> Except as otherwise provided in Section 16-10a-1704, **this chapter applies to all domestic corporations in existence on July 1, 1992, that were incorporated under any general statute of this state** providing for incorporation of corporations **for profit**, and to actions taken by the directors, officers, and shareholders of such corporations after July 1, 1992.

(Emphasis added.)

STATEMENT OF THE CASE

This is an appeal from the trial court's Ruling and Order dated June 8, 2005, granting the Rule 12(b)(6) Motions to Dismiss of Dale Ostler, Vyron Ostler, Ostler International, Inc. and Ostler Property Development, Inc. (the "Motions")(R. 317-32). The trial court found that Mr. Stowell's Complaint failed to state legally viable claims for relief against Ostler International, Inc., Ostler Property Development, Inc., Dale Ostler and Vyron Ostler for three reasons:

First, the trial court held that the oral shareholder agreements (Complaint ¶ 21 [R. 5] & ¶ 27 [R. 8])(collectively referred to as the "**Oral Agreements**") upon which Mr. Stowell's claims were premised did not comply with the mandatory writing requirement set forth in Utah Code Ann. § 16-10a-732(2) (1992). Specifically, the trial court found that "an agreement formed which allows a corporation to operate outside of the requirements of the [Utah Revised Business Corporation Act], 'shall be set forth' in the articles of incorporation or bylaws, or in a written agreement." (Ruling and Order p. 6; R. 322). The Complaint alleges and, therefore, there was no dispute, that the Oral Agreements were oral and not in writing.

Second, the trial court held that even if Section 732(2)'s writing and signing requirements were somehow inapplicable to the Oral Agreements upon which Mr. Stowell's claims were based, those agreements expired 10 years after their formation: "[U]nless the agreement provides specifically for the agreement to endure beyond ten years, it falls within the default operation of subsection 2(c), which is that it 'shall be . . . valid for 10 years.'" (Ruling and Order p. 6; R. 322). The Complaint alleges that the two Oral Agreements are 12 and 17 years old. Accordingly, the trial court held, "[b]ecause the corporations were formed in 1988 and 1993, any agreement ceased to be enforceable no later than July 2003, which, coincidentally was about the time of Gary's death." (Ruling and Order pp. 6-7; R. 322-23).

Third, the trial court held that the Oral Agreements between Dale Ostler and Gary Ostler were personal to Dale Oslter and Gary Ostler and "cannot be enforced beyond the grave." (Ruling and Order p. 8; R. 324).

STATEMENT OF FACTS

Accepting the facts pled in the Complaint as true, for the purposes of this appeal only, the following is a fair summary of the material facts in this case:

Gary W. Ostler and Dale Ostler were brothers. (Complaint ¶ 2; R. 2). In January 1988, Gary and Dale Ostler incorporated Ostler International, Inc. (Complaint ¶ 8; R. 2). In July of 1993, Gary and Dale Ostler incorporated Ostler Property Development, Inc. (Complaint ¶ 9; R. 3). Both Ostler International, Inc., and Ostler Property Development, Inc. (collectively, the "Ostler Corporations") are Utah corporations. (Complaint ¶¶ 3-4; R. 2). No bylaws have been adopted for either corporation. (Complaint ¶¶ 19-20; R. 4). Gary and Dale Ostler were the only shareholders in the Ostler Corporations, each brother holding 50% of the shares in each corporation. (Complaint ¶ 10; R. 3).

Gary Ostler died in an airplane accident on July 13, 2003. (Complaint ¶ 1; R. 2). Dale Ostler holds 50% of the shares and the Estate of Gary Ostler holds 50% of the shares of the Ostler Corporations. (Complaint ¶ 11; R. 3). Appellant Douglas L. Stowell is the personal representative of the Estate of Gary Ostler. (Complaint ¶ 1; R. 2).

Gary and Dale Ostler verbally agreed as the shareholders in the Ostler Corporations that "all policy of the [Ostler Corporations] would be adopted and implemented and the company managed, operated and its business conducted only upon and pursuant to the mutual consent and agreement of the company's shareholders."(Complaint ¶ 27; R. 8). Furthermore, pursuant to the Oral Agreements:

> **All policy** and practices **for the operation of Ostler International and for the operation of Ostler Property Development,** ***including*** the **conduct of the business** of each company **and the making of net income distributions to shareholders** of each company was formulated and

> implemented only and solely by Decedent and Dale Ostler as the only shareholders of each company and with the consent of the other of them. **No company policies, programs, business ventures or net income distributions were undertaken by the Ostler Corporations without their joint and mutual consent**. All decisions and policies of both Ostler International and Ostler Property Development and of the Board of Directors of each company were contingent, conditional and based upon the mutual consent and approval of said shareholders. **It was the understanding, agreement and practice of each company's board of directors and each member thereof that the business and affairs of the company should and would be undertaken and managed *only in accordance with such mutual consent of the company's shareholders***.

(Complaint ¶ 21; R. 5)(collectively referred to as the "**Oral Agreements**").

Gary and Dale Ostler also agreed that, except upon their mutual consent and agreement as shareholders of the Ostler Corporations, they would not "offer or provide their shares" in the Ostler Corporations to any other person. (Complaint ¶¶ 28 & 34; R. 8 & 11). As consideration for the Oral Agreements, Gary and Dale Ostler agreed that they would continue to maintain, operate and conduct the business of the Ostler Corporations only for their mutual financial benefit and that neither would commission, engage in or conduct any business policy or activity to which the other did not agree. (Complaint ¶¶ 27 & 33; R. 8 & 10-11).

Prior to Gary Ostler's death, the Ostler Corporations were managed, operated and their business conducted in accordance with and pursuant to the Oral Agreements. (Complaint ¶¶ 27 & 33; R. 8 & 10-11). Mr. Stowell alleged, and the trial court properly accepted as true for the purpose of the Motions, that Appellees breached the Oral Agreements after Gary Ostler's death. (Complaint ¶¶ 25, 29 & 35; R. 7-8 & 11).

In December 2004, Mr. Stowell filed a Complaint against Appellees based upon alleged breaches of the Oral Agreements. (R. 1-24). On January 20, 2005, pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, Appellees Ostler Corporations filed a Motion to Dismiss Mr. Stowell's Complaint. (R. 97-98). On January 24, 2005, pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, Appellees Dale Ostler and Vyron Ostler also filed a Motion to Dismiss Mr. Stowell's Complaint. (R. 140-143).

On June 8, 2005, the trial court entered a Ruling and Order granting Appellees' Motions to Dismiss and dismissing Mr. Stowell's claims. (R. 317-26). On July 6, 2005, Mr. Stowell filed a Notice of Appeal. (R. 327-28).

SUMMARY OF ARGUMENT

Historically, only the a board of directors – not the shareholders – governs a corporation. Only the board of directors has the power to declare distributions (dividends), appoint officers, set policy and approve major transactions. To provide flexibility for closely-held corporations and, at the same time, predictability, in 1992, Utah adopted the Utah Revised Business Corporation Act, Utah Code Ann. §§ 16-10a-101 to -1705 (the "**Revised Act**"), including Utah Code Ann. § 16-10a-732, to enable shareholders to usurp or override director authority in specified circumstances.

Section 732(2)(a)&(c) of the Revised Act requires all shareholder agreements which usurp or override director authority to be in writing, be signed by all shareholders and have a term of only 10 years:

> (2) **An agreement authorized by this section *shall* be**:
>
> (a) **set forth**:

> (i) in the articles of incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement; or
>
> (ii) **in a *written* agreement that is *signed* by all persons who are shareholders at the time of the agreement** and is made known to the corporation;
>
> . . . .
>
> (c) **valid for 10 years, unless the agreement provides otherwise.**

Utah Code Ann. § 16-10a-732(2)(a)&(c)(1992)(emphasis added.)

By use of the word "shall," the plain language of Section 732(2) of the Revised Act mandates that, to be valid, a shareholder agreement "shall" meet those three requirements. "The best evidence of the true intent and purpose of the Legislature in enacting the Act is the plain language of the Act." *Jensen v. Intermountain Health Care, Inc.*, 679 P.2d 903, 906 (Utah 1984). Once the Court determines that the language of Section 732 is clear, an examination of the legislative history for the purpose of determining the meaning of the statute is unnecessary and inappropriate. *See Schurtz v. BMW of N. Am., Inc.*, 814 P.2d 1108, 1112 (Utah 1991) ("We first look to the statute's plain language. Only if we find some ambiguity need we look further." (citations omitted)). The trial court correctly interpreted the plain language of Section 732(2) as mandating that the Oral Agreements be in writing to be enforceable. Because the language of Section 732 is plain and unambiguous, it is improper to adopt Mr. Stowell's approach of looking for legislative intent outside of the statute itself.[1]

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[1] Even if Mr. Stowell's improper approach is followed, the Official Commentary to the Revised Act confirms the Legislature's intention that the writing requirement of Section 732 is mandatory.

From an historical perspective, the logic behind Section 732 allowing shareholders of closely-held corporations a level of flexibility in determining corporate governance becomes clear. Corporations are creatures of statute and, in Utah, exist pursuant to the Revised Act. The Revised Act not only authorizes the creation and maintenance of corporations, it establishes the basic organization and management structure of corporations. Prior to passage of the Revised Act in Utah in 1992, shareholder agreements with provisions inconsistent with the statutory requirements of Utah's corporate code had never been authorized either by case law or by statute. In 1992, the Utah Legislature enacted Section 732 of the Revised Act, which for the first time authorized shareholder agreements having provisions designed to override certain requirements of Utah's corporate code.

Section 732 is not a Statute of Frauds: It is a statute that authorizes a contractual deviation from a statutory scheme. Whereas a Statute of Frauds makes unenforceable a contract which is otherwise is valid, Section 732 of the Revised Act operates to validate agreements which would be unenforceable because they are contrary to the statutory scheme and traditional rule that "[a]ll corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors . . . ." Utah Code Ann. § 16-10a-801 (1992).

In other words, Section 732 creates a safe harbor to enable certain shareholder contracts to override director authority. Mr. Stowell's arguments labor under the false assumption that, similar to an oral agreement subject to a statute of frauds, the Oral Agreements in this case otherwise would be valid. That assumption is false: Because the Oral Agreements attempt to usurp or override director authority, the only way for them to become valid is to comply with Section 732.

Section 732 goes further: It eliminates the issue as to whether an underlying shareholder agreement overriding the statutory scheme of corporate governance is valid. Under Section 732, if a shareholder agreement is "inconsistent" with the enumerated instances in subsection (1), such as overriding corporate governance by a board of directors, the shareholder agreement is invalid unless it complies with the mandatory requirements of subsection (2): The shareholder agreement must be in a writing signed by all shareholders.

Further, pursuant to Section 732(2)(c) of the Revised Act, the Oral Agreements terminated ten years after their formation. Nothing in the record establishes that Gary Ostler and Dale Ostler specifically agreed that the Oral Agreements would be valid beyond ten years. By the time Mr. Stowell filed his Complaint in December 2004, both of the Oral Agreements were more than ten years old, and therefore, had expired.

Finally, the Oral Agreements were personal to Gary Ostler and Dale Ostler and expired upon Gary Ostler's Death. The material terms of the Oral Agreements mandated that the Ostler Corporations be managed through the mutual agreement of Gary and Dale Ostler, only for the mutual benefit of Gary and Dale Ostler, and that Gary and Dale Ostler would not transfer their shares. None of those terms can be met given the death of Gary Ostler. Because the participation of Gary Ostler is a material part of the Oral Agreements, they were personal contracts that expired upon Gary Ostler's death.

ARGUMENT[2]

Enforcement of the Oral Agreements leads to a nightmare for the future management of the Ostler Corporations and countless other closely-held Utah corporations subject to disputes when one of the principal shareholders transfers his or her shares though sale or inheritance. If mere management style is elevated to the level of an enforceable shareholder agreement, generations of future shareholders in the Ostler Corporations will be required to manage all levels of corporate decision by unanimous consent. Fifty years from now, when the number of shareholders has expanded, the Ostler Corporations' routine decision-making ability will become paralyzed, as each decision will require unanimity among dozens of shareholders with varying levels of interest, background and personal motivation. The shareholder of a single share in the Ostler Corporations could deadlock the corporations' management and cause their untimely demise.

Enforcement of the Oral Agreements will lead to a nightmare for the future management of the Ostler Corporations that will make the farm animals' management of the farm in George Orwell's ANIMAL FARM, by contrast, appear to be a smooth-running, well-conceived operation.

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[2] Dale Ostler and Vyron Ostler absolutely deny that the Oral Agreements existed or that Dale Ostler and Gary Ostler ever managed the Ostler Corporations under the arrangement described in Mr. Stowell's Complaint. (Dale Ostler's Affidavit in Support of Dale Ostler's and Vyron Ostler's Rule 12(b)(6) Motion to Dismiss; R. 105-06 at ¶¶ 9-15). Yet, because the case was decided under Rule 12(b)(6) of the Utah Rules of Civil Procedure, the trial court properly did not consider Dale Ostler's Affidavit and accepted Mr. Stowell's allegations as true for the purpose of deciding this case under Rule 12(b)(6). For the purposes of this Appeal, Dale Ostler and Vyron Ostler also will assume, for the purposes of argument only, that Mr. Stowell's allegations in the Complaint are true.

POINT I

APPELLANT AGREES THAT ORAL AGREEMENTS ARE SUBJECT TO SECTION 732

The parties agree that "The predominant purpose of Section 732 is to acknowledge and validate shareholder agreements that conflict in one particular or another with other sections of the Revised Act." Brief of Appellant at 21. Further, there is no dispute between the parties regarding the applicability of Section 732 to the Oral Agreements: "Because the subject shareholder agreements are inconsistent with one or more sections of the Revised Act, they specifically fall within the contemplation of Section 732(1)." Brief of Appellant at 20; *see* Memorandum in Opposition to Motion for Summary Disposition at 14.

POINT II

THE ORAL AGREEMENTS ARE UNENFORCEABLE BECAUSE THEY FAIL TO COMPLY WITH THE PLAIN LANGUAGE OF SECTION 732, WHICH REQUIRES SHAREHOLDER AGREEMENTS TO BE WRITTEN IF THEY OVERRIDE DIRECTOR AUTHORITY OR OTHERWISE CONFLICT WITH THE REVISED ACT

The plain language of Section 732(2) of the Revised Act requires the Oral Agreements to be in writing and signed by all shareholders. Mr. Stowell is attempting to allege, prove and enforce unsigned and unwritten Oral Agreements. Outside of Section 732, there is no Utah statutory or common law authority validating shareholder agreements which usurp or override director authority or otherwise conflict with the requirements of the Revised Act. In fact, because the Oral Agreements conflict with the governance requirements of the Revised Act, for those Oral Agreements to be enforceable, they must be authorized under

subsection (1) of Section 732 and must comply with the formal writing and signing requirements of subsection (2) of Section 732:

> (2) **An agreement authorized by this section *shall* be:**
>
> (a) **Set forth:**
>
> (i) **in the articles of incorporation or bylaws** and approved by all persons who are shareholders at the time of the agreement; **or**
>
> (ii) **in a written agreement** that is ***signed*** **by all** persons who are **shareholders** at the time of the agreement and is made known to the corporation;

Utah Code Ann. § 16-10a-732(2)(a) (1992) (emphasis added).

Section 732(2)'s use of the term "shall" indicates a mandatory requirement. *See Paar v. Stubbs,* 2005 UT App 310,¶7, 117 P.3d 1079 ("'Shall' is commonly understood to create a mandatory condition." (citations omitted)). The ordinary and accepted meaning of the term "shall" is that it indicates a mandatory action. "The word shall is ordinarily language of command." *Escoe v. Zerbst*, 295 U.S. 490, 493 (1966), *See also Board of Educ. of Granite Sch. Dist. v. Salt Lake County*, 659 P.2d 1030, 1035 (Utah 1983) ("While 'shall' has been validly interpreted as directory . . ., it is usually presumed mandatory and has been interpreted as such previously in this and other jurisdictions.") (citations omitted); and *A.E. v. Christean*, 938 P.2d 811, 815 (Utah Ct. App. 1997) (holding that "shall" usually is presumed mandatory) (citing Webster's Third New International Dictionary p. 2085 (1986) (defining "shall" as "used in laws, regulations, or directives to express what is mandatory.")).

The trial court was bound to interpret Section 732(2) by the ordinary and accepted meaning of its terms, including the mandatory "shall." Thus, Section 732(2) mandates that

shareholder agreements which depend upon Section 732 for authorization must be set forth in writing and signed by all shareholders.

In interpreting a statute, the court should first look at the statute's plain language, only looking further in the event of the finding of an ambiguity. *See Schurtz v. BMW of N. Am., Inc.*, 814 P.2d 1108, 1112 (Utah 1991) ("We first look to the statute's plain language. Only if we find some ambiguity need we look further." (citations omitted)). A statute should be interpreted to effect legislative intent: "[T]o that end, we presume that the Legislature used each term advisedly, and we give effect to each term according to its ordinary and accepted meaning." *Versluis v. Guaranty Nat. Cos.*, 842 P.2d 865, 867 (Utah 1992) (citation omitted).

It is improper to look for evidence of legislative intent outside of a statute's language when the language is unambiguous. "When the language of a particular provision of a statute is ambiguous, the Court may attempt, following principles of statutory construction, to ascertain the intention of the Legislature; but where there is no ambiguity the plain language of the statute must be taken as the expression of the Legislature's intent." *P.I.E. Employees Fed. Credit Union v. Bass*, 759 P.2d 1144, 1151 (Utah 1988) (citation omitted) (emphasis added). Because Section 732 is unambiguous, neither the trial court nor this Court should consider any source besides Section 732's plain language to confirm that the writing requirement is mandatory.

Mr. Stowell incorrectly suggests that, because Section 732 does not specifically state that shareholder agreements which do not comply with its formal requirements are invalid, such agreements may stand on their own under traditional legal principles. *See* Brief of Appellant at 16. Mr. Stowell's premise not only ignores the fact that, under traditional legal principles, shareholder agreements which override the corporate code are invalid, it ignores

this Court's repeated holdings that where a right is governed and controlled entirely by statute, the right cannot be successfully exercised unless the authorizing statute's formal requirements are met.

The Court's enunciation of that principle has been most clearly stated in the area of probate law. "[T]he right to dispose of property by will is governed and controlled entirely by statute. Such statutes are mandatory, and, unless strictly complied with, the instrument, as a will, is void." *In re Alexander's Estate*, 139 P.2d 432, 434 (Utah 1943). Accordingly, the failure of a will to meet formal statutory requirements results in the invalidation of the will, even where the statute itself does not specify a consequence for the failure of a will to conform to its formal requirements. For example, in *In re Wolcott's Estate*, 180 P. 169 (Utah 1919), the Court invalidated an holographic will for its failure to comply with the authorizing statute's formal requirements despite the fact that there was evidence that the document in question was intended to be a will.[3] Because the will in question did not meet the statutory requirements, the Court held that "the instrument cannot be sustained as a will without arbitrarily setting the statute aside and substituting our will for that of the Legislature. This we have no right or power to do, however much we may appreciate the hardship incident to a strict construction in the present case." *Id.* at 170. *See also Taylor v. Estate of Taylor*, 770 P.2d 163 (Utah Ct. App. 1989) (holding that an absolute failure to comply with statute requiring will to be signed by the testator and witnesses in one another's presence invalidated will.).

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[3] The statute in question provided: "An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed. Such wills may be proved in the same manner as other private writings." Comp. Laws Utah 1917, § 6316. The statute itself did not provide for a consequence for noncompliance with its terms.

The principle set forth in these probate cases applies equally to Section 732 of the Revised Act. The right to enter into a shareholder agreement which overrides requirements of the Revised Act is a right that exists, is governed and controlled exclusively by Section 732. *See* Points III, IV & V, *infra.* Failure to comply with Section 732's formal requirements must result in invalidation of a shareholder agreement despite the fact that Section 732 itself does not specify a consequence for noncompliance. To hold otherwise would result in an arbitrary setting aside of Section 732 and the Legislative intent expressed in it. *See State v. Morrison*, 31 P.3d 547, 552 (Utah 2001) (holding that Court avoids statutory interpretations that render parts or words in a statute inoperative or superfluous).

POINT III

SECTION 732 IS NOT A STATUTE OF FRAUDS

Section 732 is not a Statute of Frauds: It is a statute that authorizes a contractual deviation from a statutory scheme. A Statute of Frauds may invalidate an otherwise enforceable contract. For example, the Statute of Frauds in Utah Code Ann. § 25-5-4 (2004) enumerates certain agreements that are void unless in writing, such as contracts that cannot be performed in less than a year, promises to answer for the debt of another, *etc.* The underlying assumption, therefore, is that the contract is enforceable unless the Statute of Frauds invalidates it. That premise applied to Section 732 of the Revised Act, however, is false.

In other words, Section 732 provides a safe harbor to enable certain shareholder contracts to permissibly override otherwise statutory required director authority. Mr. Stowell's arguments labor under the false assumption that, similar to an oral agreement

subject to a statute of frauds, the Oral Agreements in this case otherwise would be valid. That assumption is false: Because the Oral Agreements attempt to usurp or override director authority, the only way for them to become valid is to comply fully with Section 732.

Section 732 goes further: It eliminates the issue as to whether an underlying shareholder agreement overriding the statutory scheme of corporate governance is valid. Under Section 732, if a shareholder agreement is "inconsistent" with the enumerated instances in subsection (1), such as overriding corporate governance by a board of directors, the shareholder agreement is invalid unless it complies with the mandatory requirements of subsection (2): The shareholder agreement must be in a writing signed by all shareholders.

POINT IV

IN UTAH, CORPORATE DIRECTORS – NOT SHAREHOLDERS AS SUCH – HAVE AUTHORITY TO MANAGE AND GOVERN CORPORATIONS

Traditionally, the chief hallmark of corporate structure has been the separation of ownership from management. *See* Utah Code Ann. § 16-10-33 (Model Act – pre-1992 and now repealed) and § 16-10a-801 (Revised Act). Shareholders own the corporation and directors manage it, and the management powers cannot be delegated. 2 Fletcher, *Cyclopedia of the Law of Private Corporations* (1990) § 497, p. 591; *East Jordan Irrigation Co. v. Morgan*, 860 P.2d 310, 313-314 (Utah 1993). "All corporate powers shall be exercised by or under the authority of . . . its board of directors . . . ." Utah Code Ann. § 16-10a-801(2).

Directors' powers to manage and govern the corporation include the power to appoint officers (Utah Code Ann. § 16-10a-830), declare the timing and amount of distributions (*i.e.*, dividends) (Utah Code Ann. § 16-10a-640), and approve major transactions

(Utah Code Ann. § 16-10a-1201). Historically, shareholder actions which usurped those powers were said to "sterilize" the board of directors. *Long Park, Inc. v. New Brunswick Theatres Co.*, 77 N.E.2d 633 (N.Y. 1948).

To provide flexibility for closely-held corporations and, at the same time, maintain predictability regarding the standards for corporate organization and management, Utah adopted the Revised Act, including Utah Code Ann. § 16-10a-732, to enable shareholders to usurp or override director authority so long as certain conditions are met.

POINT V

HISTORICALLY, UTAH HAS NOT ALLOWED SHAREHOLDERS TO USURP OR OVERRIDE DIRECTOR AUTHORITY

Historically in Utah, there was neither statutory nor common law authority to allow shareholder agreements to override director authority. It was only with the Utah Legislature's enactment of Section 732 in 1992 that such shareholder agreements first became legally recognized.

"A corporation cannot be created except as provided by statute. It is a mere creature of law." *Nat. Bank of the Republic v. Price*, 234 P. 231, 236 (Utah 1923). Utah adopted its first corporate statute in 1872, expanded it in 1888 and codified it at statehood in 1896. For 104 years – from 1888 to 1992 – Utah had a strict governance rule for Utah corporations, namely, "The corporate powers of the corporation shall be exercised by the board of directors."[4] This requirement historically meant that the directors must personally govern

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[4] Compiled Laws of Utah 1888 § 2272.6; R.S. 1898 § 324; Laws, 1903, ch. 94; Compiled Laws of Utah 1907 § 324; Compiled Laws of Utah 1917 § 871; R.S. of Utah 1933 § 18-2-20; Utah Code § 18-2-20 (1943); Utah Code § 16-2-21 (1953); and Utah Code § 16-

the corporation and may not delegate their duties. *See East Jordan Irrigation Co. v. Morgan*, 860 P.2d 310, 313-14 (Utah 1993) (holding the board of directors and not the shareholders control the affairs of the corporation); 2 Fletcher, *Cyclopedia of the Law of Private Corporations* (1990) § 497, p. 591 (explaining the traditional rule of director management).

Traditionally, shareholders in Utah corporations could not contract around the statutory requirements of corporate governance by directors. While the issue never arose in Utah case law, in other jurisdictions, "shareholder agreements were invalidated by courts for a variety of reasons, including so-called 'sterilization' of the board of directors and failure to follow the statutory norms of the applicable corporation act." Utah Corporation and Business Law Manual with Commentary, Official Commentary To Utah Revise Business Corporation Act, § 732, p. 731 (2005 ed.) (citing *Long Park, Inc. v. Trenton-New Brunswick Theatres Co.*, 77 N.E.2d 633 (N.Y. 1948).

The Utah Supreme Court indicated its adherence to this traditional rule from an early date: "[A]uthority to manage and control the corporation and conduct its business is left exclusively to the board of directors and not to the stockholders as such." *Anderson v. Grantsville N. Willow Irrigation Co.*, 169 P. 168, 169 (Utah 1917). Prior to the enactment of the Revised Act, there was no Utah case law indicating that, through agreement, shareholders could override director authority or other aspects of the statutory scheme.

In 1961, Utah adopted the Model Business Corporation Act (the "Model Act") as its corporate statute. Utah's adoption of the Model Act did not change Utah's rule mandating management of a corporation by its directors. *See* Utah Code Ann. § 16-10-33 (1961) ("The

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10-33 (1961).

business and affairs of a corporation shall be managed by the board of directors."). Nor did Utah's Model Act authorize shareholder override of statutory requirements through shareholder agreements.

From sometime in the 1950s to 1992, there was agitation from some quarters for more flexibility in corporate statutes to accommodate shareholder agreements, especially in regard to closely held corporations. *See* Harlan W. Murray, editor, *A Plea for Separate Statutory Treatment of the Close Corporation*, 33 N.Y.U. L. Rev. 700 (1958). In fact, some of this criticism was directed at Utah's corporate act:

> [The Model Act as adopted in Utah] does not provide for flexible shareholder's agreements . . . . Shareholders in a close corporation usually act as both directors and officers, owners and managers; among themselves they are considered partners. It seems logical therefore, that as partners, they be allowed broad prerogatives in making agreements that will benefit the business without having to act under the express title of directors. **Yet agreements among shareholders pertaining to management functions have been struck down as being violative of the directors' prerogatives since most statutes state that corporate affairs will be managed only by the board of directors.**

Grant S. Kesler, Comment, *The Need for Legislative Recognition of Utah's Close Corporation*, 1970 Utah L. Rev. 270, 276-77 (emphasis added). Despite this criticism, until 1992, neither the Utah Legislature nor the Utah courts authorized shareholders, by agreement, to override the statutory requirements for management by directors. In fact, prior to 1992, Utah opted *not* to adopt proposed revisions to the Model Business Corporation Act that were promulgated to allow certain types of shareholder agreements under certain circumstances. *See* Model Bus. Corp. Act Ann. v.3 p. 113-14 (1971) (adding thereto Sections 34 and 35).

POINT VI

OVER THE YEARS, SOME STATES ALLOWED CERTAIN SHAREHOLDER AGREEMENTS TO OVERRIDE DIRECTOR AUTHORITY BUT A SPLIT OF DECISIONS RESULTED

In the years before statutes such as Section 732 became common place, some courts allowed shareholders, by agreement, to override certain provisions of corporate statutes in certain limited situations.[5] For example, in *Galler v. Galler*, 203 N.E.2d 577 (1964), the Illinois Supreme Court ordered specific performance of a shareholders' agreement that provided for salary and dividend payments to the shareholders as well as their families. The Illinois court enforced that agreement in *Galler* despite the absence of any statutory authorization allowing shareholders to override the statutory requirement that the corporation be managed by its directors.

The development of statutory[6] and common law authorizations for shareholder agreements to override the requirements of corporate codes remained sporadic and uncertain. In fact, in 1972 an Illinois Appellate Court rejected the argument that the Illinois Supreme Court's ruling in *Galler* permitted a shareholder agreement to amend corporate by-laws despite contrary statutory language: "Slight deviations from corporate norms may be

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[5] *See e.g. DeBoy v. Harris*, 113 A.2d 903 (Md. 1955) (upholding pre-incorporation shareholder agreement concerning division of profits); *Royster v. Baker*, 365 S.W.2d 496 (Mo. 1963) (upholding a shareholder agreement allowing majority of shareholders to manage corporation); and *Welchman v. Koschwitz*, 91 A.2d 169 (N.J. 1952) (upholding shareholder agreement delineating stock redemption requirements).

[6] Before Section 732 was promulgated, some states enacted statutes which authorized shareholder agreements that affect corporate governance. *See e.g.* Del. Code Ann. tit. 8 § 350 (1974); Ill. Rev. Stat. Ch. 32 § 1211 (1983); and Kan. Stat. Ann. § 17-7210 (1981).

permitted. However, action by the shareholders which is in direct contravention of the statute cannot be allowed." *Somers v. AAA Temp. Services, Inc.*, 284 N.E.2d 462, 465 (Ill. Ct. App. 1972).[7]

POINT VII

SECTION 732 WAS ENACTED TO ALLOW FLEXIBILITY AND PREDICTABILITY IN GOVERNANCE STRUCTURES FOR CLOSELY HELD CORPORATIONS

Until the Utah Legislature's enactment of the Revised Act in 1992, shareholders in Utah corporations had neither statutory nor common law authorization to override the statutory requirements for corporate governance, such as the absolute management authority of the board of directors. By adopting Section 732, the Utah Legislature changed the traditional law regarding shareholder agreements:

> Rather than relying on further uncertain and sporadic development of the law [relating to the validity of shareholder agreements] in the courts, **section 732 . . . rejects the older line of cases [refusing to enforce shareholder agreements]. It adds an important element of predictability previously absent from the Model Act and affords participants in**

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[7] *See also McDonald v. Dalheim*, 683 N.E.2d 447 (Ohio Ct. App. 1996) (invalidating a shareholder agreement that divested directors of their authority to manage the corporation); *In re Petrol Terminal Corp.*, 120 F. Supp. 867 (D. Md. 1954) (invalidating shareholder agreement providing that shareholder would be employed by corporation for 20 years); and *Roberts v. San Jacinto Shipbuilders, Inc.*, 198 S.W.2d 488 (Tex. Civ. App. 1946) (invalidating shareholder agreement which mandated employment and salary requirements in relation to a certain individual).

> **closely-held corporations greater contractual freedom to tailor the rules of their enterprise.** The drafters have elected to add section 732 of the Model Act to the Revised Act.

Official Commentary to the Utah Revised Business Corporation Act, § 732 p. 338 (emphasis added).[8]

Under the traditional rule regarding shareholder agreements, the Oral Agreements would have been invalid as impermissibly conflicting with the Utah corporate code. Absent the authorization of Section 732, Gary Ostler and Dale Ostler (as shareholders) had no authority to contractually override the statutory scheme set forth in the Revised Act (or, before 1992, the Model Act). It is only through the Legislative authorization in Section 732(1) that shareholder agreements of the type Mr. Stowell attempts to rely upon may exist. Mr. Stowell apparently agrees:

> **The predominant purpose of Section 732 is to acknowledge and validate shareholder agreements that conflict in one particular or another with other sections of the Revised Act.**

Brief of Appellant at 21 (emphasis added).

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[8] In 1984, the Committee on Business Corporations of the Section of Corporations of the American Bar Association (the "ABA Committee") promulgated the Revised Model Business Corporation Act as a comprehensive restatement of the Model Business Corporation Act. Richard A. Booth, *A Chronology of the Evolution of the MBCA*, 56 Bus. Law 63, 66 (2000). In 1990, the ABA Committee promulgated Section 7.32 as an amendment to the Revised Model Act to allow shareholder agreements that affect statutory corporate governance requirements under certain circumstances. In 1992, Utah adopted the Revised Model Act, including Section 7.32 of the Model Revised Act, which became Section 732 of the Utah Revised Act. *See* Utah Code Ann. § 16-10a-101 to -1705.

POINT VIII

THE ORAL AGREEMENTS IN THIS CASE CONFLICT IN NUMEROUS WAYS WITH UTAH's REVISED ACT

There was no dispute before the trial court that the Oral Agreements conflict with the management provisions of the Revised Act. For example, the Oral Agreements eliminate many duties of the board of directors of the Ostler Corporations. Section 801 of the Revised Act provides:

> (1) Except as provided in Section 16-10a-732, each corporation must have a board of directors.
>
> (2) **All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors**, subject to any limitation set forth in the articles of incorporation or in an agreement authorized under Section 16-10a-732.

Utah Code Ann. § 16-10a-801 (1992) (emphasis added). In direct conflict with Section 801 of the Revised Act, the Oral Agreements specifically provide "that all policy of the company would be adopted and implemented and the company managed, operated and its business conducted only upon and pursuant to the mutual consent and agreement of the company's shareholders." (R. 8 at ¶ 27). This Court need not look beyond the Revised Act itself to determine that only by Section 732 is an agreement cognizable.

There are several other ways in which the Oral Agreements conflict with the Revised Act's requirements, something Mr. Stowell admits. *See* Brief of Appellant at 20; and Memorandum in Opposition to Motion for Summary Disposition at 14.

> **Distributions to Shareholders:** The Revised Act provides that "A board of directors may authorize and the corporation may make distributions to its

> shareholders subject to any restriction in the articles of incorporation and the limitations in Subsection (3)." Utah Code Ann. § 16-10a-640(1). In direct conflict with the Revised Act, the Oral Agreements provide, "All policy and practices for the operation of [the Ostler Corporations], including the conduct of the business of each company and the making of net income distributions to shareholders of each company was formulated and implemented only and solely by [Gary Ostler] and Dale Ostler as the only shareholders of each company and with the consent of the other of them." (Complaint ¶ 21; R. 4-5).
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> **Filling Vacancies in the Board:** The Revised Act provides that the remaining directors may fill a vacancy on the board. See Utah Code Ann. § 16-10a-810(1). In direct conflict with the Revised Act, Mr. Stowell alleges that it is a breach of the Oral Agreements for the remaining director (after Gary Ostler's death) to have "nominated, appointed or elected one or more members of the Board of Directors of [the Ostler Corporations] without prior notice to, consulting and obtaining the agreement of [Mr. Stowell]." (Complaint ¶25; R. 6-7).
>
> **Compensation of Directors:** The Revised Act provides that "[T]he board of directors may fix the compensation of directors." Utah Code Ann. § 16-10a-811. In direct conflict with the Revised Act, the Oral Agreements provide, "All decisions and policies of the [Ostler Corporations] and of the Board of Directors of each company were contingent, conditional and based upon the mutual consent and approval of [Dale Ostler and Gary Ostler as shareholders]. (Complaint ¶ 21; R. 4-5).

As to each of the preceding categories, the Model Act contains similar provisions which are inconsistent with the Oral Agreements.

Mr. Stowell acknowledges that the Oral Agreements are subject to Section 732, yet he argues that those Agreements need not comply with Section 732's formal requirements. In effect, Mr. Stowell asks the Court to ignore the requirements Section 732(2). His request is contrary to standard principles of statutory construction.

> "'A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, **each part or section should be construed in connection with every other part or section so as to produce a harmonious whole**.'" We follow "'the cardinal rule that the

> general purpose, intent or purport of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious to its manifest object.'"

Miller v. Weaver, 2003 UT 12,¶17, 66 P.3d 592 (citations omitted).

POINT IX

THE OFFICIAL COMMENTARY TO SECTION 732 INDICATES THAT THE LEGISLATURE INTENDED SECTION 732's WRITING REQUIREMENT TO BE MANDATORY, WHICH SUPPORTS APPELLEES' POSITION AND UNDERMINES APPELLANT'S THEORY OF THIS CASE

Mr. Stowell suggests that the trial court erred in its interpretation of Section 732 because it failed to take legislative intent into account. Specifically, Mr. Stowell argues that an isolated portion of the Official Commentary should be taken as evidence that Section 732(2)'s writing requirement is not mandatory and that the trial court was in error. *See* Brief of Appellant at 15-20.

The Court does not need to divine legislative intent from isolated portions of the Official Commentary where the plain language of Section 732 is unambiguous. "The best evidence of the true intent and purpose of the Legislature in enacting the Act is the plain language of the Act." *Jensen v. Intermountain Health Care, Inc.*, 679 P.2d 903, 906 (Utah 1984).

Even taking Mr. Stowell's improper approach and moving beyond the plain language of the Revised Act, it remains clear that the Legislature intended Section 732(2)'s writing requirement to be mandatory. The Official Commentary is exceptionally clear in regard to the mandatory nature of the writing requirement for those agreements that depend upon Section 732 for validation:

> An agreement can be validated under section 732 whether it is set forth in the articles of incorporation, the bylaws or in a separate agreement, and whether or not section 732 is specifically referenced in the agreement. **The principal requirements are simply that the agreement be in writing and be approved or agreed to by all persons who are then shareholders**.

Utah Corporation and Business Law Manual with Commentary, Official Commentary To Utah Revise Business Corporation Act, § 732(2), p. 346-48 (2005 ed.) (emphasis added).

Mr. Stowell bases his claim that the trial court erred upon Mr. Stowell's misunderstanding of a small portion of the Official Commentary, which states:

> Section 732(1) defines the range of permissible subject matter for shareholder agreements largely by illustration, enumerating seven types of agreements that are expressly validated to the extent they would not be valid absent section 732. The enumeration of these types of agreements is not exclusive; nor should it give rise to a negative inference that an agreement of a type that is or might be embraced by one of the categories of section 732(1) is, ipso facto, a type of agreement that is not valid unless it complies with section 732.

Official Commentary at 338 (emphasis added).

When the Official Commentary is examined as a whole, it becomes clear that the language Mr. Stowell cites is simply a restatement of the principle that a shareholder agreement need only comply with Section 732 when it conflicts with another provision of the Revised Act:

> Section 732 supplements the other provisions of the Model Act and Revised Act. If an agreement is not in conflict with another section of the Revised Act, no resort need be made to section 732, with its requirement of unanimity. For example, special provisions can be included in the articles of incorporation or bylaws with less than unanimous shareholder agreement so long as such provisions are not in conflict with other provisions of the Revised Act. Similarly, Section 732 would not have to be

> relied upon to validate typical buy-sell agreements among two or more shareholders or the covenants and other terms of a stock purchase agreement entered into in connection with the issuance of shares by a corporation.
>
> The types of provisions validated by section 732 are many and varied. Section 732(1) defines the range of permissible subject matter for shareholder agreements largely by illustration, enumerating seven types of agreements that are expressly validated to the extent they would not be valid absent section 732. The enumeration of these types of agreements is not exclusive; nor should it give rise to a negative inference that an agreement of a type that is or might be embraced by one of the categories of Section 732(1) is, ipso facto, a type of agreement that is not valid unless is complies with Section 732. Section 732(1) also contain a "catch all" which adds a measure of flexibility to the seven enumerated categories.
>
> . . . .
>
> Subsection (1) is the heart of section 732. It states that certain types of agreements are effective among the shareholders and the corporation even if inconsistent with another provision of the Revised Act. Thus, an agreement authorized by Section 732 is, by virtue of that section, "not inconsistent with law" within the meaning of sections 202(2)(b) and 206(2) of the Revised Act. In contrast, a shareholder agreement that is not inconsistent with any provisions of the Revised Act is not subject to the requirements of section 732.

Official Commentary (emphasis added).

The particular phrase upon which Mr. Stowell bases his argument simply explains that just because a shareholder agreement may be pigeonholed into one or more of Section 732(1)'s enumerated examples does not mean that the shareholder agreement must comply with the remainder of Section 732. In other words, agreements of the type enumerated in Section 732(1) must comply with Section 732(2) only if they are "inconsistent with one or more provisions of [the Revised Act]." Utah Code Ann. §16-10a-732(1). Thus, the Official

Commentary provides: Section 732(1)'s enumerated list of permissible shareholder agreement subject matter should not give rise to a "negative inference that an agreement of a type that is or might be embraced by one of the categories of Section 732(1) is, ipso facto, a type of agreement that is not valid unless is complies with Section 732." *Id.*

The test in determining whether a shareholder agreement must comply with the writing and signing requirements of Section 732(2) is not whether the shareholder agreement is embraced by one of the categories of Section 731(1): Instead, the test is whether the shareholder agreement is inconsistent with any provision of the Revised Act. For example, a shareholder agreement might be embraced by Section 732(1)(h) because it "governs . . . the relationship among shareholders . . . ." Utah Code Ann. § 16-10a-732(1)(h). It is conceivable that the provisions in some such agreements, however, may not conflict with any provision of the Revised Act. Absent a conflict or attempt to alter the statutory scheme, the requirements of Section 732(2) may not apply. Yet, since the Oral Agreements do conflict with the Revised Act, they must comply with Section 732(2).

POINT X

ALTHOUGH INCORPORATED FOUR YEARS PRIOR TO UTAH's ENACTMENT OF SECTION 732, THE ORAL AGREEMENT FOR OSTLER INTERNATIONAL, INC., IS SUBJECT TO SECTION 732.

The trial court correctly held that the Revised Act, including Section 732, applied to Ostler International, Inc., and the Oral Agreement under which Mr. Stowell alleges it was managed, despite the fact that the corporation and the alleged Oral Agreement was formed

in 1988 (R. 2-3 at ¶ 8) – prior to the enactment of the Revised Act in 1992.[9] The Revised Act states:

> [T]his chapter applies to all domestic corporations in existence on July 1, 1992, that were incorporated under any general statute of this state providing for incorporation of corporations for profit, and to actions taken by the directors, officers, and shareholders of such corporations after July 1, 1992.

Utah Code Ann. § 16-10a-1701 (1992) (emphasis added).

The Official Commentary to Section 1701 removes any possible doubt regarding the Revised Act's application to all Utah corporations for profit regardless of incorporation date:

> The fundamental principle underlying section 1701 is that the Revised Act should ultimately be made fully applicable to all existing business corporations as well as to all new business corporations formed after the effective date of the new statute. It is undesirable to "grandfather" existing corporations under earlier statutes since that results in the permanent coexistence of two different and overlapping systems of corporation law, with resulting confusion. This is particularly true of the Revised Act, which, having been based on the Revised Model Act, builds directly on the experience of many years with existing corporations statutes and contains few major substantive changes.
>
> Section 1701 applies this basic principle by making the Revised Act applicable as of its "effective date" (prescribed in section 1706) to all domestic corporations formed under general statutes for corporations for profit, subject to specified limitations. This includes all prior general business corporations or associations, or corporations formed for the purpose of engaging in a business for which the state has provided a separate incorporation procedure.

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[9] Ostler Property Development, Inc., was incorporated in 1993, after the effective date of the Revised Act, eliminating any issue concerning the applicability of the Revised Act to that corporation and the Oral Agreement under which it was allegedly managed.

> The application of the Revised Act to existing corporations is limited to preserve certain provisions that were thought to be particularly important to the protection of existing shareholder expectations and rights. See the commentary to section 1703.

Official Commentary to Utah Code Ann. § 16-10a-1701 (emphasis added).

Mr. Stowell now implies that, because Ostler International was incorporated in 1988 – four years before the Revised Act was enacted – the Revised Act should not apply to the Oral Agreement for Ostler International. Brief of Appellant at 13-14. Before the trial court, Mr. Stowell argued that because the Revised Act states that it applies "to actions taken by the directors, officers, and shareholders of such corporations after July 1, 1992," (R. 195-06), Section 732 of the Revised Act does not apply to the Oral Agreement for Ostler International because that corporation was formed prior to July 1, 1992. *See* Utah Code Ann. § 16-10a-1701. That proposition directly conflicts with the purpose and intent of Section 1701. Moreover, if Mr. Stowell's proposition were accepted, that the Oral Agreement for Ostler International was in existence from 1988 – the beginning of that corporation's existence – then there was no statutory authorization for such an agreement. Accordingly, the alleged Oral Agreement would be void as contrary to the statutory scheme at that time, *i.e.*, that only the Board of Directors could manage that corporation.

Section 1701 indicates that the Revised Act replaced existing corporate law for all Utah for-profit corporations – existing and yet to be formed. The Utah Legislature made an express determination not to "grandfather" existing corporations under the old corporate law regime. *See id.*

The only exceptions to the applicability of the Revised Act to all corporations for profit are contained in Section 1704's saving provisions. *See* Utah Code Ann. § 16-10a-1704

(1992). Section 1704 does not provide an exception of the application of Section 732 to corporations incorporated before the Revised Act went into effect, nor does it except from the Revised Act shareholder agreements that were formed prior to 1992. Section 732 establishes the legal standard applicable to the formation of valid shareholder agreements, including shareholder agreements in pre-Revised Act corporations. As the trial court correctly found, there is nothing in the record to suggest that Section 1704's saving provisions apply in any fashion to the Ostler Corporations or the alleged Oral Agreements. (R. 321).

POINT XI

RECENT CASES IN MAINE AND CONNECTICUT CONFIRM SECTION 732's WRITING REQUIREMENT FOR SHAREHOLDER AGREEMENTS

Recently, courts in two other states have confirmed the writing requirement of Section 732(2). The most significant decision comes from the Supreme Court of Maine. In *Villar v. Kernan*, 695 A.2d 1221 (Me. 1997), the Supreme Court of Maine considered the issue of whether "Maine law, including but not limited to 13-A M.R.S.A. § 618 [the equivalent of Utah's Section 732], preclude[s] an action for breach of an oral contract between two shareholders of a closely held corporation prohibiting their receipt of salaries from the corporation?" *Villar*, 695 A.2d at 1222.

In *Villar*, Mr. Kernan and Mr. Villar were shareholders in a pizza business. *See id.* According to Mr. Kernan, he had an oral shareholder agreement with Mr. Villar specifying that they would never receive salaries from the pizza business. *See id.* After Mr. Kernan began receiving consulting fees from the pizza business, Mr. Villar filed a federal lawsuit

alleging breach of the oral shareholder agreement. *See id.* The federal district court questioned whether Maine's shareholder agreement statute prohibited enforcement of an oral shareholder agreement and, if not, whether the Kernan-Villar shareholder agreement could be enforced in equity. *See id.* at 1222-23. Finding no controlling precedent, the federal trial court certified the question for review by the Maine Supreme Court. *See id.*

In response, the Maine Supreme Court noted that "Section 618 operates to validate agreements that would be unenforceable under traditional notions of acceptable corporate practice." *Id.* at 1223. Using simple principles of statutory interpretation that do not differ from those used in Utah, the Maine Supreme Court held that "Because the agreement must rely upon section 618 for its validity and falls within the validating provision of section 618(1), it must meet the section's specifications and therefore must be in writing to be enforceable." *Id.* at 1224 (emphasis added).[10]

At the time of *Villar*, Maine's corporate code was based on an earlier version of the Model Act, but was phrased slightly different than, but substantially similar to, the Revised

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[10] The Maine Supreme Court went a step further and held that any agreement affecting a corporation in a way addressed by Maine's section 618(1), which is similar to Utah's Section 732(1), whether the agreement conflicted with another portion of the Maine corporate code or not, had to comply with section 618, including the writing requirement. *See Villar*, 695 A.2d at 1224 n.3. In this aspect of its holding, the Maine Supreme Court concerned the very section of Revised Model Act Official Commentary upon which Mr. Stowell bases his appeal in this case: "[T]he enumeration of these types of agreements is not exclusive; nor should it give rise to the negative inference that an agreement of a type that is or might be embraced by one of the categories . . . is, ipso facto, a type of agreement that is not valid unless it complies with [that] section . . . ."). *Id.* (citing 2 Model Business Corporation Act Ann. 7-246 (1996)). Accordingly, the Maine Supreme Court interpreted this portion of the Revised Model Act Official Commentary in the same manner as do Appellees: Under the Revised Act, a shareholder agreement only need comply with Section 732 if it conflicts with another provision of the Revised Act, regardless of whether the shareholder agreement affects the corporation in a manner set forth in Section 732(1).

Model Act's Section 7.32 and Utah's Section 732.[11] Maine's shareholder agreement statute at the time of *Villar* provided that no written shareholder agreement which conflicts with other sections of Maine's corporate code or that restricts the powers of the board of directors will be considered invalid so long as such agreement is either set forth in the articles of incorporation or is subscribed to in writing by all shareholders. *See* Me. Rev. Stat. Ann., tit. 13-A, § 618.

The approach taken by the Maine Supreme Court in *Villar* is the same approach the Court should take in this case. In this case, the Oral Agreements must invoke Section 732 for validation because, under traditional, pre-Revised Act, corporate law, they would have been invalid. The Oral Agreements are only valid if they come under the safe harbor established by Section 732. The plain language of Section 732(2) mandates that any authorized shareholder agreement shall be written.

In another case, the Appellate Court of Connecticut enforced a written shareholder agreement that complied with the Connecticut equivalent of Section 732. In *Fairfax Properties, Inc. v. Lyons*, 806 A.2d 535 (Conn. Ct. App. 2002), the Court held that a shareholder resolution, signed by all of the shareholders, and providing for the method for the election of a seventh director, was an enforceable contract because the writing complied with Section 33-717(b) of Connecticut's corporate code. *See id.* at 545. Section 33-717(b) of the Connecticut corporate code comes from Revised Model Act § 7.32 and is identical, or nearly identical, to Utah Code Ann. § 16-10a-732(b). *See* Conn. Gen. Stat. Ann. § 33-717 (1997).

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[11] In 2001, Maine adopted the Revised Model Act's shareholder agreement statute as Me. Rev. Stat. Ann., tit. 13-C, § 743. Accordingly, Maine's shareholder agreement statute is now identical, or nearly identical, to Utah Code Ann. § 16-10a-732.

POINT XII

DUE TO THE 10-YEAR LIMIT OF SECTION 732, THE ORAL AGREEMENTS EXPIRED AND BECAME UNENFORCEABLE NO LATER THAN 2003

Based on Section 732(2)(c), the Oral Agreements expired before Mr Stowell filed his Complaint in this case. Ostler International was incorporated in 1988 and Ostler Property was incorporated in 1993. (R. 2-3 at ¶¶ 8 and 9). If the Oral Agreements were in existence from the beginning of the corporations, as suggested (Brief of Appellant at 13-14), then both of the Oral Agreements were more than ten years old by the time Mr. Stowell filed his Complaint on December 15, 2004.

Section 732(2)(c) contains a default time limitation applicable to shareholder agreements:

> (2) **An agreement** authorized by this section **shall be**:
>
> . . . .
>
> (c) **valid for 10 years, unless the agreement provides otherwise**.

Utah Code Ann. § 16-10a-732(2)(c) (emphasis added).

The trial correctly held that, even if there were shareholder agreements that were valid despite the fact that they were not in writing, those agreements expired after 10 years because there was no agreement to extend the default time duration established by Section 732(2)(c). (R. 322-23).

There is no allegation in the Complaint and, therefore, absolutely nothing in the record to suggest that Gary Ostler and Dale Ostler specifically agreed that the Oral Agreements would be valid for more than ten years. Recognizing that the record does not

establish a specific term regarding duration as required by Section 732(2)(c), Mr. Stowell suggests that because there was no term specified in the agreements, it should be inferred that they were to last beyond 10 years. Essentially, Mr. Stowell is asking the Court to write into the Oral Agreements a contractual provision that even he does not allege existed. Such a request is improper: "A court will not enforce asserted rights that are not supported by the contract itself." *Rio Algom Corp. v. Jimco, Ltd.*, 618 P.2d 497, 505 (Utah 1980).

Further, this Court has instructed that, "[i]n an attempt to give effect to the intent of the parties, the settled rule is that if a contract fails to specify a time of performance the law implies that it shall be done within a reasonable time under the circumstances." *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852, 858 (Utah 1998) (citations omitted). "An implied reasonable time limit is as much a part of the agreement as those terms that are expressed." *Id.* In this case the reasonable time limit that the law should imply is 10 years, as clearly mandated by Utah Code Ann. § 16-10a-732(2)(c).

POINT XIII

POLICY CONSIDERATIONS REQUIRE SECTION 732 TO BE FOLLOWED, NOT IGNORED

By affirming the trial court's ruling, the Court will advance several important policy objectives.

A. Notice of Deviations from the Statutory Standards for Corporate Governance.

The enforcement Section 732(2)(a)'s writing requirement fulfills the fundamental objective of providing shareholders, the corporation, prospective shareholders and their advisors with notice of shareholder agreements which override statutory requirements.

Notice of shareholder agreements is an important concept built into Section 732.[12] Without clear requirements of notice, complicated questions arise concerning enforceability of the shareholder agreement against the corporation and against transferees of shares subject to the shareholder agreement. Enforcement of Section 732(2)(a)'s writing requirement will provide certainty that the corporation, its shareholders, prospective shareholders and their advisors are aware not only of the existence of a shareholder agreement, but of the agreement's specific provisions.

B. Predictability

Enforcing the writing requirement of Section 732(2)(a), will also ensure that shareholder agreements have predictable results. Adding predictability to shareholder agreements was one of the Legislature's original goals in enacting Section 732:

> [Section 732] adds an important element of predictability previously absent form the Model Act and affords participants in closely-held corporations greater contractual freedom to tailor the rules of their enterprise.

Official Commentary at 338.

Corporate structure, functioning and management organization is predictable because the Revised Act contains express provisions concerning each of these areas. Directors,

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[12] Beside requiring that shareholder agreements be contained either in the articles of incorporation, the bylaws or in a writing signed by all shareholders, Section 732 also requires that the existence of the shareholder agreement be noted conspicuously on the front and back of each outstanding share certificate. *See* Utah Code Ann. § 16-10a-732(3). The share certificates for the Ostler Corporations have no such notations, but that was not a fact relied upon by the trial court because its decision was limited to the allegations contained in the Complaint. *See* Affidavit of Dale Ostler (R. 104-112).

officers, shareholders, prospective shareholders and their advisors may all refer to the Revised Act for written guidance on corporate organization and management structure.

If shareholders are allowed to orally modify the requirements of the Revised Act, then the predictability created by the Revised Act is destroyed. The predictability regarding corporate organization and management provided by the Revised Act should be preserved for those corporations subject to shareholder agreements which override the Revised Act's requirements. Enforcement of Section 732's writing requirement accomplishes this important objective. By requiring that shareholder agreements which override the Revised Act's requirements be written, the predictability and consistency of corporations is preserved, both as among shareholders and as between states with similar statutes. Whether a corporation is governed traditionally, according to the Revised Act, or untraditionally, according to a shareholder agreement, there will be a writing to ensure that the functioning of the corporation is predictable.

Further, the predictability and clarity brought about by the enforcement of Section 732(2)(a)'s plain language writing and signing requirements will improve judicial economy by preventing oral agreements that depend upon Section 732 for authorization from being the subject of litigation. If shareholders orally can modify without limit the requirements of the Revised Act, the doors to the courthouse will be open to many new types of claims that will be based upon nothing more than allegations of supposed oral agreements.

C. Elimination of Evidentiary Issues

Similarly, enforcing the plain language of Section 732(2)(a) will streamline the evidentiary questions presented by disputes over shareholder agreements. Written

shareholder agreements establish a foundation for determining which shareholders entered into the contract, as well as the contract's provisions, date and the duration Written shareholder agreements also invoke the evidentiary benefits of the parol evidence rule. Unwritten shareholder agreements are easy to allege after the death of a shareholder, allegations fraught with the same peril as transactions subject to a Statute of Frauds.[13]

D. Elimination of Conflicts with Other Public Policy Concerns

Enforcement of Section 732's formal requirements ensures that shareholder agreements do not conflict with other areas of public policy. In enacting Section 732, the Legislature granted shareholders in corporations an unusual right: It enabled shareholders to contract around some statutory requirements. However, the unusual right allowed by the Legislature is not without limits. Section 732 establishes a limited safe harbor within which shareholders can exercise their right to override statutory requirements. Section 732(1) establishes the limits of Section 732's safe harbor, with the outer boundary being that shareholders may not override requirements of the Revised Act in a manner which would be contrary to public policy. *See* Utah Code Ann. § 16-10a-732(1)(h).

E. The Difficulties Associated With Adopting Mr. Stowell's Analysis

Mr. Stowell argues that shareholder agreements, even those that override the statutory requirements of the Revised Act, may be valid under principles of ordinary contract law;

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[13] "The object of the statute of frauds is to prevent fraud and perjury in the enforcement of obligations, depending for their evidencing support on the unassisted memory of witnesses, by requiring certain designated contracts and transactions to be evidenced by a writing signed by the party to be charged and not for purpose of promoting fraud or aiding an individual in the perpetration of fraud." *Joseph E. Seagram & Sons, Inc. v. Shaffer*, 310 F.2d 668, 673 (10th Cir. 1962) (citations omitted).

independent of compliance with Section 732's formal requirements. Brief of Appellant at 16. Under Mr. Stowell's reasoning, Section 732 and its limited safe harbor become meaningless.[14] This is contrary to the Court's rule of statutory construction, which gives effect to every word in a statute, and avoids interpretations that render parts or words in a statute inoperative or superfluous. *See State v. Morrison*, 31 P.3d 547, 552 (Utah 2001) ("Indeed, any interpretation which renders parts or words in a statute inoperative or superfluous is to be avoided." (citation omitted)). Shareholders would be free to contractually override or ignore the Revised Act's reporting requirements, its fiduciary duty requirements, or its creditor protection requirements and any other requirement of the Revised Act, so long as their agreement passes muster under simple contract law.

The Court's enforcement of the plain language of Section 732 will ensure that shareholder agreements which override statutory corporate governance provisions are kept within the limited bounds established by the Legislature, as well as within the bounds of predictability.

Public policy will be best served by the Court affirming of the trial court's dismissal of Mr. Stowell's claims.

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[14] "'A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.' We follow 'the cardinal rule that the general purpose, intent or purport of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious to its manifest object.'" *Miller v. Weaver*, 2003 UT 12,¶17, 66 P.3d 592 (citations omitted).

POINT XIV

THE ORAL AGREEMENTS ARE PERSONAL SERVICE CONTRACTS AND EXPIRED ON DEATH OF GARY OSTLER IN 2003

If the Oral Agreements are accepted at face value, two brothers formed their business in corporate form, together bore the risks and rewards, and together managed the corporations based upon their unique, shared mutual experience and expertise which made them successful. So far, that portion of the claim seems plausible.

The next portion of the alleged Oral Agreements, however, is incredible. Mr. Stowell alleges the agreement to jointly manage the corporations is inheritable and assignable. Despite the skill and expertise necessary for the successful continuation of the enterprise, the brothers agreed that their agreement of joint management could be transferred to the personal representative of their estate, essentially an attorney with a different skill set than the one that made the Ostler Corporations successful. From Dale Ostler's perspective, Mr. Stowell is a stranger chosen at random, with little or no business background and not even an allegation of the necessary skills for the agreed upon task.

It is as if the parties agreed that a famous painter, say Picasso, agreed to paint a commissioned painting, but died in the middle of the project. To suggest that Picasso's personal representative should finish the project seems absurd at best. Mr. Stowell's claim in this case is similar to suggesting that this Court place Picasso's paint brush in his hand.

It is a longstanding principle of law that contracts that are personal in nature cannot be assigned or inherited:

> If the acts to be performed [under a contract] are strictly personal in nature, or if the subject matter of the contract is such that its performance depends upon the continued existence

> of a particular person or of a particular condition or status which goes to the very essence of the contract, then there is necessarily an implied condition that death will terminate the contract . . . .

McDaniel v. Rose, 153 S.W. 2d 828, 830 (Mo. Ct. App. 1941). Utah law dictates that a contract is personal in nature "where the personal needs, characteristics or personality of the obligee are dominant factors in the reason for contracting . . . ." *Clark v. Shelton*, 584 P.2d 875, 877 (Utah 1978).

The alleged Oral Agreements were personal to Dale Ostler and Gary Ostler, obligating them only to each other. Personal contracts cannot be assigned or inherited because the personal involvement of the contracting parties is an essential part of the contract. The trial court's determination that the Oral Agreements were personal contracts that expired upon Gary Ostler's death should be upheld because those agreements required the participation of only Gary Ostler and Dale Ostler and existed for their exclusive benefit. It is impossible for the terms of the Oral Agreements to be fulfilled in the absence of Gary Ostler.

A. The Shareholder Agreements Were Personal to Dale Ostler and Gary Ostler Because They Demanded the Participation of Only Gary Ostler and Dale Ostler and Existed for the Benefit of Only Gary Ostler and Dale Ostler

The facts, as alleged by Mr. Stowell, stand as an admission that the Oral Agreements are personal services contracts:

- All policy and practice for the operation of the Ostler Corporations was to be formulated and implemented only and solely by Gary Ostler and Dale Ostler. No company policies, programs, business ventures or net income distributions were undertaken without the joint mutual consent of Gary Ostler and Dale Ostler. (Complaint ¶ 21; R. 4-5);

- The shares of capital stock in the Ostler Corporations owned by Gary Ostler and Dale Ostler would not be transferred to any third-party. (Complaint ¶ 22; R. 5); and

- The Ostler Corporations would be maintained and operated exclusively for the mutual financial benefit of Gary Ostler and Dale Ostler (Complaint ¶ 27; R. 7-8).

Essentially, according to Mr. Stowell, Dale Ostler and Gary Ostler agreed to govern and run both Ostler Corporations as equal partners with complete and exclusive joint authority to govern.

B. The Oral Agreements Expired At Gary Ostler's Death

The "subject matter of the [shareholder agreements] is such that [their] performance depends upon the continued existence of a particular person or of a particular condition or status which goes to the very essence of the contract." *McDaniel v. Rose*, 153 S.W. 2d 828, 830 (Mo. Ct. App. 1994). Gary Ostler's death irreparably frustrated the purpose and subject matter of the Oral Agreements. Accordingly, "there is necessarily an implied condition that death will terminate the contract . . . ." *Id.*

Upon Gary Ostler's death, the Oral Agreements were impossible to perform. "The doctrine of impossibility of performance is one by which a party may be relieved of performing an obligation under a contract where supervening events, unforeseeable at the time the contract is made, render performance of the contract impossible." *Holmgrem v. Utah-Idaho Sugar Co.*, 582 P.2d 856, 861 (Utah 1978). Performance of an agreement can be excused under a theory of impossibility due to the death of a party to a personal services contract, due to the performance being made illegal by an intervening statute and/or due to frustration of purpose. *See generally* 24 Am Jur 2d Proof of Facts § 3; 18 Williston on Contracts § 1931 (3d ed.).

Gary Ostler's death made performance of the principal and material terms of the Oral Agreements literally impossible. Because Gary Ostler died, neither Ostler International nor Ostler Property can be managed only through the mutual consent of Dale Ostler and Gary Ostler . Because Gary Ostler died, shares must necessarily be transferred to third-parties: Gary Ostler's heirs, for instance. Finally, because Gary Ostler died, the Ostler Corporations cannot be managed for the exclusive mutual financial benefit of Gary Ostler and Dale Ostler. Gary Ostler's heirs would be precluded from doing so under the Oral Agreements.

C. The Oral Agreements Are Not Assignable or Inheritable

Because of their nature, personal services contracts are not inheritable or assignable, are not eligible for equitable treatment under the doctrine of partial performance and are not subject to the equitable remedy of specific performance. *See Thurston v. Box Elder County*, 892 P.2d 1034, 1040 (Utah 1995) (explaining that personal services contracts are not usually subject to specific performance and setting forth the reasons why); *Cobabe v. Stanger*, 844 P.2d 298, 301 (Utah 1992) (explaining that personal services contracts are not assignable and that other party cannot be forced to accept the personal services of a substitute); *Doltz v. Harris & Assocs.*, 280 F. Supp.2d 377, 388 (E.D. Pa. 2003) (stating that doctrine of partial performance does not apply to personal services contracts).

Personal service contracts are not assignable or inheritable because the performance bargained for cannot be performed by an assignee or heir. No matter how capable Mr. Stowell or Gary Ostler's heirs may be of running the Ostler Corporations, they are incapable of providing Gary Ostler's special vision, knowledge, judgment, skill and ability to each decision that needs to be made for the businesses, as is required by the Oral Agreements. If

Mr. Stowell or Gary Ostler's heirs are allowed to assume Gary Ostler's role under the Oral Agreements, the fundamental nature and foundation of the agreements will have changed.

Under Mr. Stowell's interpretation, the obligations of the Oral Agreements survive death and the retirement of the parties and survive the transfer of shares to third parties (despite the contractual provision stating that shares would not be transferred to third parties). According to Mr. Stowell, the Oral Agreements "run with the shares" in perpetuity, forever binding current and future shareholders to manage the Ostler Corporations with the unanimous mutual consent of all shareholders regardless of the identity, ability or number of shareholders.

D. Enforcement of the Oral Agreements Would Subject Dale Ostler to A Lifetime of Involuntary Servitude

Finally, according to Mr. Stowell, Dale Ostler is obligated to manage the Ostler Corporations for the rest of his life, cannot resign and cannot retire. Dale Ostler's personal health, freedom, desires and dreams are of no consequence. It would impose an extreme burden amounting to involuntary servitude. "But no man can have a vested interest in the work or labor of another. He has no right in law to insist that another must work for him. Such right would amount to involuntary servitude or slavery and be in violation of Section 21 of Article 1 of the State Constitution." *McGrew v. Industrial Comm'n*, 85 P.2d 608, 610 (Utah 1938). *See also* U.S. Const. amend. XIII. That Dale Ostler and Gary Ostler could have intended such a result defies belief, not to mention the terms of the Oral Agreements.

CONCLUSION

The trial court's Ruling and Order should be affirmed on all points. The plain language of Section 732, with its use of the mandatory word, "shall," makes this a simple

case: Section 732's writing and signing requirements are mandatory. The analysis frankly should end there.

All parties agree that the Oral Agreements are subject to Section 732 of the Revised Act. The underlying premise as to whether Section 732 invalidates otherwise enforceable contracts or validates otherwise void contracts is where the parties diverge.

Section 732 enables a safe harbor where shareholders may tailor to their specific needs the scheme of corporate governance. Section 732 simply requires the shareholders demonstrate by a to a written agreement their intent to vary statutorily-required governance by a Board of Directors. Absent an agreement in writing to the contrary, however, even that safe harbor is limited to a ten-year period. The Oral Agreements fail to comply with the safe harbor provisions of Section 732 in two material respects: The Oral Agreements are not in writing signed by all shareholders and, because they are not in writing, obviously do not contain a written provision extending them for more than ten years.

To enforce these unwritten agreements would do violence to the statutory scheme. It would add uncertainty to the corporate structure and would allow allegations of oral agreements that would bind successor generations of shareholders in perpetuity. Accepting this proposition would require the Ostler Corporations, 50 years from now, to be governed by the unanimous agreement of dozens if not hundreds of potentially unqualified individual shareholders (with the only qualification being that they are heirs of Dale Ostler or heirs of Gary Ostler, or their heirs or the heirs of their heirs, *etc.*).

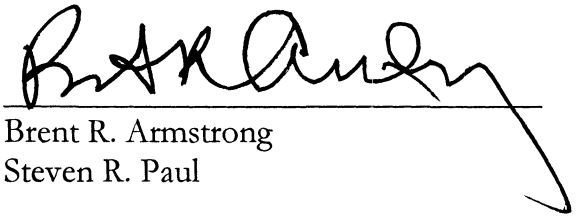
Finally, the trial court correctly found that the Oral Agreements were personal to Gary Ostler and Dale Ostler and expired upon Gary Ostler's death. The material terms of the Oral Agreements mandated that the Ostler Corporations be managed only and solely

through the mutual agreement of Gary and Dale Ostler, only for the mutual benefit of Gary and Dale Ostler, and that Gary and Dale Ostler would not transfer their shares. None of those terms can be met in the absence of Gary Ostler. Because the participation of Gary Ostler is a material part of the Oral Agreements, they were personal contracts that expired upon Gary Ostler's death.

This Court should affirm the trial court's Ruling and Order that Mr. Stowell's Complaint failed to state legally viable claims for relief because the Oral Agreements upon which Mr. Stowell's claims are based fail to meet the requirements of Section 732 of the Revised Act. The Court also should affirm the trial court's Ruling and Order that the Oral Agreements cannot be enforced because they constitute personal services contracts that expired upon the death of Gary Ostler.

Dated: November 21, 2005.

ARMSTRONG LAW OFFICE, P.C.



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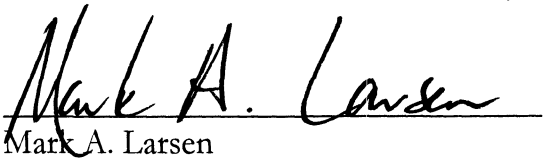

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2005, I caused two true and correct copies of the foregoing BRIEF OF APPELLEES DALE OSTLER and VYRON OSTLER to be served on counsel of record by depositing a copy in the United States Mail, postage prepaid, and addressed as follows:

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